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In the

Supreme Court

of the

United States

OCTOBER TERM, 197

NO. _____

OSCAR SOLIS-ESTRADA

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court
of the
United States

OCTOBER TERM, 1971

NO. _____

OSCAR SQUELLA-AVENDANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, by and through his undersigned attorneys, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed the ruling of the United States District Court granting petitioner's motion to suppress substantial portions of the physical evidence against him.

OPINIONS BELOW

The opinion of the Court of Appeals (App. *infra* pp. 1-20) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered and entered August 25, 1971. A motion to stay the issuance of the mandate, as to Petitioner only, pending a petition to this Court was timely filed September 15, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence seized after a warrantless search was properly suppressed by the trial court on the grounds

a. that the search and arrest were unlawful since there was an unreasonable failure to seek or secure a search or arrest warrant;

b. and that the seizure was improper since the entry did not comply with this Court's ruling in *Miller v. United States*, 357 U.S. 301.

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be

> violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3109 of Title 18 U.S.C. provides in pertinent part:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpcse, he is refused admittance. . . .

STATEMENT

On July 27, 1970 five of the original seven Defendants were arrested for various violations of Federal Narcotics laws relating to the 200 pounds of cocaine which the District Court suppressed.[1] After various delays including a reindictment (D.App. 6) the case was brought on for trial on December 1, 1970. At that time evidence was taken on a joint motion to suppress which was granted by the trial court on December 1, 1970 (D.App. 7; G-App. 5, 6, 78). The Government announced its intention to appeal pursuant to Title 18 U.S.C., Section 1404 and on December 22, 1970 filed a notice of appeal and Certificate of Good Faith

[1]An additional defendant was arrested in early October, some two months after the first indictment (D-App 1). The symbol "D-App", "G-App" and "R" will refer respectively to the Petitioner-Defendant's printed appendix, the Governments printed appendix (which included the transcript of the proceedings before the trial court) and the record all filed in the court of appeals. The symbol "App" refers to the appendix to this brief.

(D.App. 7). At that time all of the arrested Defendants, except Petitioner, who was released on a $50,000 cash and collateral bond with stringent limitations on November 29, 1970, were in custody. (R. 35, 37). The Petitioner remains at liberty on the same bond.[2]

The testimony at the motion to suppress reveals that the Bureau of Narcotic and Dangerous Drugs received information from an unrevealed alleged confidential informant that a large shipment of narcotics was expected in Miami for delivery to Andres Rodriguez, a Co-Defendant below, who was coming from New York to receive it. (G-App. 19-23) The agent testified that he had no knowledge of the informant's prior reliability. (G-App. 24) Neither the alleged informant nor the agents had actually seen any cocaine until the time of the suppressed search and arrest and, in fact, the informant did not even tell the agents what type of packages the alleged narcotics was to be delivered in. (G-App. 21, 24-26, 30, 31)

The identity of the Defendants arrested on July 27, 1970, at the place of the search became known to the Bureau of Narcotic and Dangerous Drugs beginning on July 10th and continuing until July 24, 1970. (G-App. 26-29) The names of Co-Defendants Rodriguez and Quintanilla as well as the address of the place searched was known to the agents on or before July 13, 1970. (G-App. 19-23)

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[2]One additional defendant was released on recognizance bond by order of the court of appeals. He is believed to have fled since he has failed to report as ordered. Another defendant escaped from jail and has not been apprehended. The remaining three defendants are in custody and have not sought a stay of the court of appeals mandate which has issued as to them.

No arrest or search warrant was ever sought or obtained by any of the numerous Narcotics agents involved in the surveillance, arrest or search of this case (G-App. 19) The only time seeking warrants was discussed, was shortly before the arrests when headquarters declined to seek a warrant because of time. (G-App. 67)

The agents testified to a large amount of activity, none of which was known to be criminal in itself which culminated in the gathering of six to eight narcotics agents at an apartment rented by the Defendant Quintanilla and the subsequent arrest of two Defendants and seizure of the cocaine in question.

Other than that the cocaine was from a Chilean source, it was not known when or how it would arrive in Miami. On July 24, 1970, the informant advised that the cocaine would arrive at anytime. (G-App. 25-26) On July 26, 1970, the informant advised that the cocaine had arrived, and several Defendants were attempting to rent a certain type of automobile which would be used to pick up and deliver the cocaine. (G-App. 46) One day prior to the arrest, the informant supplied information concerning the make of car that had been rented and gave the agents the last three digits of the license plate. (G-App. 47-48).

The car was located and placed under surveillance, (G-App. 48) On the morning of July 27, 1970, it was followed to a parking place in Miami Springs, where the defendants Osorio and Quintanilla left it. (G-App. 34-35) It was next seen at about 12:30 P.M. that day, parked

beside a C-46 aircraft, where cartons were unloaded from the airplane and into the car. Then, Petitioner drove the car back to the parking lot where he parked it in the same parking space that it had been parked in by Quintanilla. (G-App. 48) The car remained there until 2:30 that afternoon, when Quintanilla returned, received the car keys from the defendant De Maria, (who has never been arrested) and drove off. (G-App. 49)

Quintanilla, in the rented automobile, was followed by Rojas, driving a green Dodge. Driving in tandem, they began circling blocks, while being followed. They stopped the cars, and Quintanilla ran back to Rojas, conferred with him for fifteen seconds, ran back to the rented car, and both cars left in opposite directions at a high rate of speed. (G-App. 49-50)

The rented car, containing the boxes, was lost by the surveillance agents. (G-App. 50) It was later located at the apartment rented by Quintanilla where the suppressed search and seizure took place at 3:30 P.M. The apartment was not under surveillance at that time, but agents had driven by to see if the car might have returned there. (G-App. 50-51) Quintanilla was observed unloading cartons from the car and taking them into the apartment, a process which took five to ten minutes. Other agents were notified by radio, and joined the first agent at the apartment. (G-App. 16-17)

The next important factual area relates to the entry made by the Narcotics agents. Agent Hudson testified that he approached the front door of the one story separate so-called apartment unit, (G-App. 59, 60, 74) he announced

his identity as police not as a Federal Narcotics Agent and said "open the door" but failed to state his purpose. (G-App. 10) Another agent testified that he announced his purpose at a side window by stating "you're under arrest" to a garbage can that he thought was a man. (G-App. 61) He also testified that this statement was made within a "split second" of the time the door was opened. (G-App. 69) The Court of Appeals recognized that the conduct of Robinson looking in the window was a search but concluded that it was so close in time to the entry that it was part of a search incident to but not in support of a lawful arrest. Appendix, p. 11) During this period of time Robinson was peering in the window and observed the packages that were later seized. (G-App. 56) The 200 pounds of cocaine were contained in several wine cartons, one large three foot high cardboard box and a suitcase. (G-App. 10-12)

In reversing the district court order that suppressed the evidence as illegally seized, the court of appeals made a finding contrary to that of the District Court's that the entry did not comply with the provisions of 18 U.S.C. Section 3109 as interpreted by this Court in *Miller v. United States*, 357 U.S. 301 (1958).

REASON FOR GRANTING THE WRIT

The case, sub judice, involves the interpretation of a factual situation which the District Court found to come within the ruling of this Court in *Miller v. United States, supra.* The court of appeals by its opinion has established an exception to the *Miller* rule and subsequent decisions of this court and has thus decided a federal question in conflict with applicable decisions of this Court. In addition, the Court of Appeals improperly rejected factual findings of the trial court,[3] albeit in dictum, that there was a violation of the *Miller, supra,* rule, where the findings of the fact finder were based on a clear record and the trial court was specifically called upon by the Government to find that the Defendants were virtually certain of the identity and purpose of the officers and thus invoke the "exceptions" which the court of appeals invoked. (G-App. 118-123)

1. The Court of Appeals has decided this case contrary to the law as established by this Court in Miller as stated above. The applicable rule as clearly enunciated in *Miller, supra* is that the criteria for a legal entry for arrest is identical to that for a search as set forth in 18 U.S.C. Section 3109, namely the requirement of announcement of *authority* and *purpose.* This Court stated at 309:

> The rule seems to require notice in the form of an express announcement by the officers of their purpose for demanding admission. The burden of

[3] "[I]f I had to rule on it, under the *Miller* case, I would hold the statements that were made then and there made in that respect were insufficient in law" (G-App. 79). "He didn't comply with the provisions and requisites of the Miller case. . . . (G-App.117)

> making an express announcement is certainly slight. A few more words by the officers would have satisfied the requirements in this case.

The Government and the Court below (app., *infra.* 19-20) attempted to distinguish *Miller*, on a tenuous basis which the trial court as fact finder rejected: The purported fact that the occupants of the building entered must have known of the presence, authority and purpose of the agents.

For this proposition the Government extensively relied upon *United States v. Luster*, (6th Cir. 1965), 342 F.2d 763. (G-App. 118-123). First, the Government and the Court of Appeals stated that the occupants made no attempt to open the door although the agents could hear "moving around" inside. The Government can take no solace in such ambiguous action; nor did they contend that there is any affirmative evidence that the occupants heard the agents. Indeed, the moving about inside may well have drowned out the agents' voices. There is, of course, no positive proof of the latter proposition, but it is equally as real and possible an inference.

Next, the actions of the occupants are used to support the hypothesis. Vasquez, it is stated, attempted to break out through the window. But the glass was heard not after the insufficient announcement, but after the entry. (G-App. 10) The distinction is a telling one, as pointed out in *United States v. Luster*, *supra*, at 766:

> "Detective Anderson knocked and all activity stopped inside. A muffled scream from a female voice was heard from the inside and *when there*

> *was no indication from the inside that the occupants would either answer or open the door, the officers forcibly entered . . .*
>
> "From the muffled scream on the inside when agent Irvin identified the officers as Federal Narcotics Bureau Agents, and the failure to open the door on request, it is obvious that the occupants knew the purpose of their visitors.
>
> "The officers having identified themselves, and being recognized from within with no effort to open the door, *were confronted with the requirement to take quick action to prevent the destruction of evidence.*" (Emphasis added).

The facts here are clearly distinguishable. The scream took place *before* entry in *Luster;* in the case at bar, the broken glass was not heard until after entry. Once the illegal entry is completed, just as when a search is completed, it may not be later justified by what it turns up. "In law it is good or bad when it starts, and does not change character from its success." *United States v. Di Re,* (1948), 332 U.S. 581, 595. In addition in *Luster* there was a time lapse afforded for answering the order to open up. No such opportunity was given here.

The same argument as to knowledge of the occupants was made in *Miller, supra,* at 310:

> "The single fact known to the officers upon which the Government relies is the 'split-second' occurrence in which the petitioner evinced 'instantaneous resistance to their entry,' an 'almost instinctive attempt to bar their entry after they had identified themselves . . . "

The Government there argued that this pointed up the fact that Miller must have known the agents' purpose, and no more formal announcement should be required.

This Court rejected this argument at 311:

> "But, first the fact that petitioner attempted to close the door did not of itself prove that he knew their purpose to arrest him. It was an ambiguous act . . .
>
> "The most that can be said is that the petitioner's act in attempting to close the door might be the basis for the officer's being virtually certain that the petitioners knew there were police at his door conducting an investigation. This however falls short of a virtual certainty that the petitioner knew of their purpose to arrest him. The requirement is not met except *by notice of that purpose* . . . " (Emphasis added).

In the instant case, the only activity after announcement was some moving around—a most ambiguous act when compared with the act in *Miller*. The breaking glass heard *after* entry cannot be used to buttress the alleged right to entry which had already occurred.

The next alleged indicia of knowledge that the occupants knew of the presence and *purpose* of the agents was the fact that Quintanilla escaped. Again, the Government neglected to place the facts on a proper time plane. If he did escape, it had to have occurred *after* the glass breaking, not before the entry. The agents all ran around to the back and arrested Vasquez admittedly trying to escape at that point. In all likelihood, if Quintanilla did escape

it occurred at that juncture. Unless Quintanilla disappeared before the agents approached the house for the arrest and seizure, then it is totally irrelevant; if it occurred after entry it is irrelevant; and if it is contended that it occurred while the agents had the house surrounded between announcement and entry, it is impossible. As for Osoria's hiding in the closet, this was well after all of the crucial facts had developed, including the arrest of Vasquez. Surely this fact cannot be used to relate back and establish the requisite knowledge at the critical moment.

Finally, the Government below attempted to justify the precipitous entry based upon the exigent circumstance exceptions. In actuality the Government was led inexorably to this position by virtue of the facts and the law it relies upon. Unfortunately, it too is a dead end. A careful reading of the *Luster* case which the Government urged as the controlling distinction of the *Miller* principle is in fact an exigent circumstance case. The import of *Luster* is clear: the agents were justified in entry after the facts developed in that case because of the "requirement to take quick action to prevent the destruction of evidence."

In the instant case the quantity of cocaine totalled over 200 pounds. It was observed in bags all over the floor. The ludicrousness of arguing that announcement of purpose had to be dispensed with to prevent the destruction of this large quantity some of which was also in suitcases and wine boxes is manifest. In fact it took one defendant from five to ten minutes to bring it into the building. In any event agents were watching the cocaine from the windows. If any attempt was made to destroy, then and only then, would the agents have been justified in breaking in the

door without announcement. The sort of exigent circumstances adverted to in *Luster* involving 21 grams of heroin or as in *United States v. Burruss* (E.D. Pa. 1969), 306 F.Supp. 915, involving one marijuana cigarette and one S.T.P. tablet obviously have no application to a situation involving 200 pounds of bagged and boxed contraband observed strewn all over the floor. (G-App. 66) The exigent circumstance doctrine was surely never intended to excuse compliance with an important constitutional requirement in such a situation.

Reference for completeness sake should be made here to the other "exigent circumstance," and that is the alleged danger to the agents. This allegation if made would be wholly unsubstantiated but for the bare assertion by agent Robinson, whose testimony was given little credence by the Trial Court. The statement by him *(G-App. 69)* that "our intelligence had it that these people were armed and, of course, we were very concerned that none of our people were hurt" is a naked *ipse dixit* with no basis in fact. Certainly, if the agents feared for their safety, the Government would have adduced testimony that they entered with weapons drawn. No such testimony was ever presented.

2) The Court of Appeals below is also in conflict with other circuits. *Hair v. United States,* (D.C. Cir. 1961) 289 F.2d 894, an occupant turned and ran up the stairs when officers came to his door and the officers then pursued him. The Government sought to excuse compliance with *Miller* on the ground that it was a "Virtual certainty" that the officers' purpose was known. The court adverted to *Miller,* stating that the act of running up the

stairs was at least as ambiguous as slamming the door and citing to *Williams v. United States*, (D.C. Cir. 1960), 276, F.2d 522, held that the conduct of the officers was not excused by the circumstances. Accord, *Keiningham v. United States*, (D.C. Cir. 1960), 287 F.2d 129. See also, *United States v. Mullin*, (4th Cir. 1964), 329 F.2d 295.

3. The Court of Appeals departed from the usual and accepted course of judicial procedure by declining to accept the factual findings of the trial court that there was no viable *factual* basis for holding that the entry in this case fell within an exception to *Miller*, *supra*. It is clear that the facts found by the trial court must be accepted by the court of appeals unless the findings are without any basis. See by analogy *e.g. Glasser v. United States*, 315 U.S. 60, 80 (1942).

4. The court of appeals agreed that the action of the agent looking into the window constituted a search and therefore a warrantless one yet excuse the conduct on the ground that it was activity needed to effect the subsequent warrantless arrest. (App. *infra* 18)

The evidence and law above make it obvious that a warrantless search was conducted prior to the entry and arrest of the Defendants and therefore the Court's argument that this was a seizure incident to a lawful arrest is not well taken.

It is now well established that police officials may not lawfully conduct a warrantless search except under the rarest of circumstances. In the majority opinion in *Chimel v. State*, 395 U.S. 752, 759-762, (1969), the Court traces

the judicial history of warrantless searches before reaching this conclusion that as stated in *Trupiano v. United States*, 334 U.S. 699, 705 (1948), "It is a cardinal rule that in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable." See *Nedrud, the Supreme Court and the Law of Criminal Investigation* at 105. The Trial Court made a finding that the Government knew of the alleged criminal activity for sometime and the facts "conclusively demonstrate that a search warrant could have been and should have been obtained in this instance" (G-App. 78). The validity of warrantless arrests, and seizures incident thereto, when there is more than sufficient time to get search and arrest warrants, was put into question by *Chimel supra* and should be finally settled by this Court since it is an important question of federal law.

When law enforcement officers choose to proceed with neither an arrest nor a search warrant they face a heavy burden of showing the reasonableness of their activity both as to failure to have a warrant and as to probable cause to search and arrest. See *Johnson v. United States*, 333 U.S. 10 at 13-14 (1948). The District Court correctly ruled that the Government failed to meet their burdens.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

ROBERT J. FRIEDMAN
and
DONALD I. BIERMAN
Attorneys for Petitioner

By _____
DONALD I. BIERMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the above petition and appendix were sent by Air Mail, Postage Prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530 and that three copies were mailed to Michael Masin, Angelo Ali and Albert Carricarti, Esquires, this ____ day of September, 1971.

ROBERT J. FRIEDMAN

LAW OFFICES
DONALD H. BIERMAN

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. [illegible]

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

OSCAR SQUELLA-AVENDAÑO, MARCO OSORIO, Etc., ANDRES R. RODRIGUEZ, CARLOS ROJAS, RODOLFO QUINTANILLA-RAUL LeMARIA and JORGE VASQUEZ,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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[illegible]

Before BROWN, Chief Judge, and GEWIN and MORGAN, Circuit Judges.

GEWIN, Circuit Judge: The United States appeals from an order granting a motion to suppress the use of about 200 pounds of cocaine as evidence. We perceive no constitutionally unlawful search and reverse.

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[1]The right to appeal is granted to the United States by 18 U.S.C. § 1404.

Acting on a confidential informant's report that certain individuals intended to smuggle a large shipment of Chilean cocaine into Miami, Florida, federal narcotics agents conducted extensive investigation and surveillance. Their efforts culminated in the arrest of appellees and the seizure of about 200 pounds of illegal cocaine. The government's brief provides an accurate description of certain pertinent events preceding the arrest. We quote from it those facts which the defendants have chosen not to dispute:

> Other than that the cocaine was from a Chilean source, it was not known when or how it would arrive in Miami. On July 24, 1970, the informant advised that the cocaine would arrive at anytime. On July 26, 1970, the informant advised that the cocaine had arrived, and the defendants were attempting to rent a certain type of automobile which would be used to pick up and deliver the cocaine. Later, the informant supplied information concerning the make of car that had been rented and gave the agents the last three digits of the license plate, which were 906.
>
> The car was located and placed under surveillance. On the morning of July 27, 1970, it was followed to a parking place in Miami Springs, where the defendants Osorio and Quintanilla left it. It was next seen at about 12:30 p.m. that day, parked beside a C-46 aircraft, where cartons were unloaded from the airplane and into the car. Then, the defendant

Squella drove the car back to the parking lot where he parked it in the same parking space that it had been parked in by Quintanilla.

The car remained there until 2:30 that afternoon, when Quintanilla returned, received the car keys from the defendant DeMaria, and drove off.

Quintanilla, in the rented automobile, was followed by Rojas, driving a green Dodge. Driving in tandem, they began circling blocks . . . They stopped the cars, and Quintanilla ran back to Rojas, conferred with him for fifteen seconds, ran back to the rented car, and both cars left in opposite directions at a high rate of speed.

The rented car, containing the boxes, was lost by the surveillance agents. It was later located at the apartment at 44 Santillane Avenue, occupied by Quintanilla. The apartment had not been under surveillance, but agents had driven by to see if the car might have returned there. Quintanilla was observed unloading the cartons from the car and taking them into the apartment. Other agents were notified by radio, and joined the first agent at the apartment. They checked with their headquarters and were told that there was not time to get a warrant.

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The circumstances immediately surrounding the arrest are somewhat more in dispute. Accordingly, factual disputes will be resolved in favor of the appellees, but evidence that is uncontradicted will be accepted at its face value unless voided by a district court finding of poor credibility.

About ten minutes after the boxes were unloaded into Quintanilla's apartment, six or eight agents had converged on the scene. Radio instructions from headquarters directed them to effect an immediate arrest, regardless of whether cocaine was found on the premises. No arrest warrant was obtained because, the agents felt, a delay might permit the destruction of evidence and allow the defendants to escape.

The testimony is unclear regarding the exact sequence and time intervals of events immediately preceding the arrest. It is clear, however, that these events occurred in rapid succession, many of them simultaneously. It appears that immediately after the decision to arrest was made, Agent Hudson of the Bureau of Narcotics and Dangerous Drugs went to the door of the apartment, knocked on it, and announced "Police. Open the door."[2] After a pause, during which he heard hurried moving around in the apartment, he repeated the announcement in Spanish, "Policia. Abra la puerta." Meanwhile, Bureau of Narcotics Agent Robinson was stationed at the right front corner window of the house; looking into it, he observed the

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[2]Agent Robinson, another narcotics agent, testified that Agent Hudson said "federal police." This testimony was rejected by the district court as not credible.

cocaine strewn on the kitchen floor and pointed it out to Bureau of Narcotics Agent Zell, who accompanied him.[3] Hearing the hurried movements inside, he announced into the window, "Open the door. You're under arrest."[4] At this point, Agent Hudson opened the unlocked front door and immediately saw the cocaine strewn in plain view on the living room floor in boxes and suitcases. Simultaneously with the opening of the door both agents heard the sound of breaking glass at the rear of the apartment. Agent Robinson remained in front to watch the front door, while Agent Hudson ran around to the rear to find the defendant Vasquez climbing out of a window. He was arrested. The defendant Osorio was found hiding in a bedroom closet and was arrested. Quintanilla, who apparently escaped through the back window, was arrested later, as were Squella-Avendano, Rodriguez, Rojas and DeMaria.

The trial judge was apparently of the opinion that the agents did in fact have probable cause to effect an arrest, but he nevertheless found the arrest fatally

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[3]It is not clear from the record whether Agent Hudson heard this remark before opening the door. Even if he did, its effect is of no import since the record clearly shows that the decision to enter the apartment and arrest its occupants had already been made.

[4]It is not clear from the record whether the remark was "yelled" or merely spoken in a normal tone of voice. It was directed at an object which agent Robinson mistakenly thought to be a man crouched and hiding in a corner of the kitchen.

Defendants attempt to discredit this testimony by including it within the ambit of the district court's disbelief of Agent Robinson's testimony that Agent Hudson identified himself as "federal police." See note 2, supra. To the contrary, the court later implicitly acknowledged its acceptance of this testimony as true.

defective because, under the circumstances, he believed the agents should not have their constitutional duty in failing to procure warrants for the search of the apartment and arrest of the defendants.[5] He expressed, in dictum, an alternative opinion[6] that the arrest could not stand because the agents did not announce their purpose before entering as required by 18 U.S.C. § 3109 and Miller v. United States.[8] The defendants seek to uphold the ruling of the district court upon the grounds given in the opinion below, and assert, in addition, that there was no probable cause for the arrest and that agent Thompson's peering through the window of the apartment was an unconstitutional search.

At the outset we dismiss and reject the district

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[5]In its ruling, the court stated from the bench:

> I believe that the law and the circumstances of this case not only indicate, but conclusively demonstrate that a search warrant could have been and should have been obtained in this instance.

[6]The court said:

> So I am not going to attempt to make any definitive ruling upon the sufficiency, the legal sufficiency of the announcement that was made with respect to the authority and purpose of those officers present at that time and at that location, but if I had to rule on it under the Miller case, I would hold that the statements that were then and there made in that respect were insufficient in law.

[7]The officer may break open any outer or inner door or window of a house, if any person within the house, or anything therein, to execute a search warrant, ... after notice of his authority and purpose. He is refused admittance.

18 U.S.C. § 3109.

[8]375 U.S. 301 (1963). Under Miller the propriety of an entrance to arrest is to be measured by a standard identical with that set out in § 3109 to test the propriety of an entrance to search.

court's ruling that warrants should have been obtained prior to the arrest. At the time of arrest 26 U.S.C. § 7607(2)[9] plainly authorized these agents to arrest without a warrant "for violations of any law of the United States relating to narcotic drugs . . . [upon] reasonable grounds to believe that the person to be arrested has committed or is committing such violation."[10] This statute has been directly held constitutional[11] and has repeatedly passed unchallenged before the Supreme Court.[12] Congress apparently chose to enact this measure in order to give narcotics agents broad discretion in performing their duties. On the one hand they are entitled to act quickly, to prevent suspects from escaping or evidence from being destroyed;[13] on the other hand, they are permitted to proceed deliberately in order to strengthen their case

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[9]70 Stat. 570 (1956). The statute has since been changed by amendment which is prospective only in application. 84 Stat. 1293 (1970).

[10]The "reasonable grounds" standard is equivalent to the constitutional test of probable cause. Draper v. United States, 358 U.S. 307 (1958).

[11]Spurlock v. United States, 295 F.2d 387 (9th Cir. 1961), cert. denied, 369 U.S. 877; cf. United States v. Monroe, 205 F. Supp. 175 (E.D. La. 1962) aff'd 320 F.2d 277, cert. denied 375 U.S. 991; United States v. Vasquez, 183 F. Supp. 190 (D.C. N.Y. 1960); State v. Walker, 206 F. Supp. 544 (E.D. La. 1962).

[12]See, *e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Draper v. United States, 358 U.S. 307 (1958); Miller v. United States, 357 U.S. 301 (1958). In Henry v. United States, 361 U.S. 98 (1959) the Court found that 18 U.S.C. § 3052 which allowed warrantless arrests by FBI agents in similar circumstances, "states the constitutional standard." 361 U.S. at 100.

[13]See, *e.g.*, United States v. Soyka, 394 F.2d 443 (2d Cir. 1968); United States v. Santiago, 327 F.2d 573 (1964); Williams v. United States, 260 F.2d 125 (8th Cir. 1958), cert. denied 359 U.S. 918.

or to apprehend additional suspects.[14]

Of course, a warrantless arrest requires closer scrutiny by the courts in determining whether probable cause exists than would an arrest based on the sound judgment of an impartial magistrate.[15] Mindful of this standard, we proceed to a consideration of the defendants' assertion that probable cause for the arrest did not exist.

II

It is too obvious to require discussion that if the informant's report that the defendants had imported 200 pounds of cocaine is worthy of belief, there was probable cause for arrest. Defendants therefore attack the reliability of the informant, pointing out that he had not previously provided any information to officers by which his reliability could be measured. The consequence is, they say, that the weight of the circum-

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[14]See, *e.g.*, Carlo v. United States, 286 F.2d 840 (2d Cir. 1961), cert. denied 366 U.S. 944; Dailey v. United States, 261 F.2d 870 (5th Cir. 1958) cert. denied 359 U.S. 969.

The value of this rationale is well illustrated by the facts of this case. Had the agents been required to apply for and receive a warrant before effectuating an arrest, they would have been required either to act prematurely on incomplete evidence, thereby risking the consequences of a vague and imprecise supporting affidavit, or to delay action until the fruits of a lengthy investigation could be distilled into a single comprehensive document, with the resulting risk that the suspects would escape or dispose of important evidence.

[15]See, *e.g.*, United States v. Ventresca, 380 U.S. 102 (1965); Beck v. Ohio, 379 U.S. 89 (1964); Aguilar v. Texas, 378 U.S. 108 (1964).

stances offered by the government to show probable cause is critically lightened and falls below the minimum necessary to support a finding of probable cause. The two-pronged test by which we measure the effect of an informant's reliability on an officer's determination of probable cause was set out in *Aguilar v. Texas.*[16] To rely on an informant's report to establish probable cause, it must affirmatively appear that the agents were informed of:

> [first] some of the underlying circumstances from which the informant concluded [that his information was accurate, and [second] some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn . . . by a police officer engaged in the often competitive enterprise of ferreting out crime, Giordinello v. U.S., supra, 357 U.S. at 986, 2 L.Ed.2d at 1509; Johnson v. U.S., supra, 333 U.S. at 14, 92 L.Ed. at 440, or, as in this case, by "an unidentified" informant.[17]

In *Spinelli v. United States*[18] the court stated that an informant's tip that did not meet *Aguilar's* require-

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16 378 U.S. 108 (1964).

17 378 U.S. at 114-115.

18 393 U.S. 410 (1969). The defendants' contentions are undercut by the recent Supreme Court decision of Harris v. United States, 29 L.Ed.2d 723 (1971). That decision indicates the showing which is constitutionaliy required in order to credit informa-

ments literally could nevertheless be used to justify a search or arrest if "it [can] fairly be said that the tip, even when parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration."[19] After noting insufficient support in a search warrant affidavit for the affiant's assertion that the information was reliable (*Aguilar's* second test), the court went on to conclude, after detailed analysis, that there were not sufficient indications in the record that the information had been gained in a reliable way (*Aguilar's* first test). In so doing, there was developed a three-tiered method of analysis for testing whether *Aguilar's* requirements had been met. First, if the information provided is in such "detail" and "minute particularity" that "a magistrate, when confronted with such detail, could reasonably infer that the in-

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tion of a police informer's personal knowledge of criminal activity. In our view *Harris* does not alter the force of our discussion of *Spinelli* as applied to the defendants. Indeed, our application of the teachings of *Spinelli* may be more beneficial to defendants than the *Harris* opinion would justify. It is obvious to us that *Harris* gives new life and meaning to Jones v. United States, 362 U.S. 257 (1962), and to other pre-*Spinelli* decisions as well. To some extent it erodes the teachings of *Spinelli*. In *Harris* the court declined to apply *Spinelli* to the extent that it prohibits a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation.

[19]393 U.S. at 415. The Second Circuit has accurately restated the *Aguilar* standard, as explained by *Spinelli*, as follows:

> Under the principles there formulated, an informer's report alone does not establish probable cause unless the informer conveys enough of the basis of his information to permit an assessment of its validity and unless there are circumstances which manifest the general credibility or reliability of the informant. United States v. Acarino, 408 F.2d 512, 514 (2d Cir. 1969).

formant had gained his information in a reliable way,"[20] then the report, if sufficiently incriminating, may, without more, be grounds for finding probable cause.[21] Secondly, less detailed information from a reliable source may be used as grounds for a finding of probable cause if independent investigation by law enforcement agencies yields sufficient verification or corroboration of the informant's report to make it "apparent that the informant had not been fabricating his report out of whole cloth."[22] Corroboration must render the report "of the sort which in common experience may be recognized as having been obtained in a reliable way."[23] Thirdly, even a report that is not under the above two standards sufficient of itself to establish probable cause may count in the magistrate's determination of probable cause, but only as one of a number of other factors of "further support" tending to show probable cause. Examples of satisfactory "further support" given in *Spinelli* involved law enforcement agencies' knowledge of independent facts which suggest criminal conduct or of facts which take on an aura of suspicion in light of the informant's tip.[24]

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[20] 393 U.S. at 417.

[21] See, *e.g.*, Draper v. United States, 358 U.S. 307 (1958); United States v. Acarino, 408 F.2d 512 (2d Cir. 1969).

[22] 393 U.S. at 417.

[23] 393 U.S. at 417. See, *e.g.*, Draper v. United States, 358 U.S. 307 (1958); Jones v. United States, 362 U.S. 267 (1960); Rogers v. United States, ____ F.2d ____ (5th Cir. 1971) [No. 31026, April 1971]; Thompson v. White, 406 F.2d 1176 (5th Cir. 1969); Bailey v. United States, 386 F.2d 1 (5th Cir. 1967).

[24] 393 U.S. at 418. See, *e.g.*, McCray v. Illinois, 381 U.S. 300 (1967); United States v. Newsome, 434 F.2d 1024 (5th Cir. 1970); United States ex rel Cummingham v. Follette, 397 F.2d 143 (2d Cir. 1968).

In a third Supreme Court decision on the subject, *Whiteley v. Warden of Wyoming Penitentiary*,[25] Justice Harlan augmented his writings in Spinelli to emphasize that the issuer of the arresting officer, or the informant, or both, that the suspects are involved in activity that is criminal in nature must be directly supported by information that is reliable within the meaning of *Aguilar* and *Spinelli*.[26] In *Whiteley* an arrest warrant was issued upon the oath of a local sheriff that the complainant "did unlawfully break and enter" a building. The arrest was made by officers who relied exclusively on a police broadcast which stated that a warrant had issued and described the defendants and their car. In holding that the arresting officer's observation that the defendants matched the description in the broadcast would not validate the otherwise inadequate arrest warrant, the court said:

> This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to corroborate a finding of probable cause for an arrest that could not adequately be supported by the tip alone. Draper v. United States, 358 US 307, 3 L Ed 2d 327, 79 S Ct 329 (1959). See Spinelli v. United States, 393 US 410, 21 L Ed 2d 637, 89 S Ct 584 (1969). But the additional information accumulated by the arresting of-

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[25] ____ U.S. ____, 28 L.Ed.2d 306 (March 29, 1971).

[26] In other words there is no reasonable cause if "the existence of the tenth and critical fact is not sufficiently provable to justify the issuance of a warrant by verifying nine other facts coming from the same source." Spinelli v. U.S., 393 U.S. 410, 426-27 (White, J. concurring).

> ficers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in Draper itself, were in the process of committing the felony. See the opinions of the Court and that of Mr. Justice White concurring in Spinelli v. United States, 393 US 410, 21 L Ed 2d 637, 89 S Ct 584 (1969).[27]

Mindful of the purpose of these rules — to guard against police action based upon a "'suspicion,' 'belief', or mere 'conclusion' ",[28] or upon "a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation"[29] — we proceed to analyze the instant facts and conclude that the arrest is justifiable on any of Spinelli's three levels.

On the first level, the meticulous and precise detail of the information supplied is ample indication that the informer's reports were made from direct observation and personal knowledge. He was in frequent contact with the authorities from July 10 until the time of arrest. During this time he provided detailed information of the defendants' evolving plans. According to his information, the defendant Rodriguez was to arrive in Miami from New York to receive a shipment of 30 kilos of Chilean cocaine from a Chil-

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[27] ____ U.S. ____, 28 L.Ed.2d at 312-13.

[28] Aguilar v. Texas, 378 U.S. 108, 114 (1964); United States v. Acarino, 408 F.2d 512, 514 (2d Cir. 1969).

[29] Spinelli v. United States, 393 U.S. 410, 416 (1969); United States v. Acarino, 408 F.2d 512, 515 (2d Cir. 1969).

ean contact. A detailed physical description of the contact was provided. Rodriguez and two other "couriers" would then transport the drug to New York where they would deliver it to an Italian named "Blackie". While in Miami, Rodriguez could be reached at either of two phone numbers; one was his sister's and the other belonged to someone named "Rudy." On July 14 the informer reported the arrival of Rodriguez. He predicted that meetings between various defendants, including Osorio, Quintanilla, Rodriguez, Vasquez, and Rojas would occur on July 17, 24, and 26. On July 24 he called to report that arrival of the cocaine was imminent. On July 26 he informed agents that it had arrived; that the amount had been increased to 90 kilos, of which Rodriguez would take at least 72; and that it would be transported in a rented white 1970 2-door Ford Galaxy bearing license plates the last three digits of which were 906.

The volume and quality of this information clearly described the accused's criminal activity in sufficient detail that "a magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way."[30] Secondly, much of the information was verified or corroborated by the agents' actual observations. Perhaps the most significant of the corroborating circumstances is the fact that the informant arranged a meeting between undercover narcotics agents and the defendant Rodriguez. The record reveals that this meeting resulted in "successful discussions concerning the purchase of

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[30]Spinelli v. United States, 393 U.S. 410, 417 (1969).

cocaine." Additionally, the phone numbers supplied by the informant were traced and were indeed found to be registered to Rodriguez' sister and Rudolph Quintanilla. Rodriguez was first observed at Quintanilla's apartment on July 14. The described Chilean contact proved to meet the description of Osorio. The meetings occurred at the times and places specified. On July 27, the day after the reported arrival date of the Cocaine, the described car was observed parked at the Miami airport beside a C-46 aircraft from which cartons were being loaded into the car.

Finally, there is ample "further support" in the record that would justify a finding of probable cause even if the informer's tips were not independently reliable. We speak here of the purchase negotiations; Quintanilla's evasive driving techniques,[31] clearly intended to avoid observation; the attempt to flee from surveillance; the frequency and variety of meetings between the defendants; and the suspicious activity connected with loading and picking up the car at the airport on the date of arrest. Colored by the informant's information, even if it were not technically reliable, the agents had ample basis upon which to conclude that an offense had been committed.

Appellants also contend that the second of *Aguilar's* tests has not been met because the officers had not used the informant in connection with other investigations and that accordingly his reliability has not been

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[31]In addition to his attempt to escape surveillance while transporting the smuggled cocaine to the apartment, agents frequently observed him circle the block in which his apartment was located presumably to check for a "tail" before proceeding on his way.

sufficiently shown. We find no merit in this contention. Proof of past reliability is but one way of buttressing an informant's credibility. Indeed, if it were the only way, so called "reliable" informants would be scarce, if not non-existent. By its own terms, *Aguilar's* second requirement was erected to insure that the informant was a "credible" person who would likely provide "reliable" information.[32] Its obvious purpose is to discourage police officers from acting to search or to arrest on information that is carelessly, maliciously, or otherwise unreliably disclosed — i.e. "a reckless or prevaricating tale."[33] It is an assurance that officers will act with reasonable confidence in the truth of those portions of the report, often of critical importance, which are not practically susceptible to verification by investigation or observation. If sufficient corroborative evidence can be collected to support a clear inference that the informer was generally trustworthy, then *Aguilar's* second requirement is met.[34]

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[32]378 U.S. at 114-115.

[33]Jones v. United States, 362 U.S. 257, 708 (1960)

[34]Spinelli v. United States, 393 U.S. 410 (1969). Accord: United States v. Gonzalez-Perez, 426 F.2d 1283 (5th Cir. 1970); United States v. Coronado, 426 F.2d 927 (5th Cir. 1970); United States v. Cabrera, 417 F.2d 211 (5th Cir. 1969); Thompson v. White, 406 F.2d 1176 (5th Cir. 1969); Bailey v. United States, 386 F.2d 1 (5th Cir. 1967); Cali v. United States, 338 F.2d 974 (1st Cir. 1964); United States v. Sharpe, 322 F.2d 117 (6th Cir. 1963). *Spinelli* fully supports this analysis. In discussing the effects of the FBI's independent investigative efforts, the Court concluded that under the facts there presented, that the inference to be drawn therefrom "cannot by itself be said to support both the inference *that the informer was generally trustworthy* and that he made his charge against Spinelli on the basis of information obtained in a reliable way." 393 U.S. at 417 (emphasis added).

There is ample corroboration of that type in this case. The fact that the informant arranged illicit purchase negotiations is itself a potent indication to the agents that the informant's accusations and knowledge of criminal activities was firmly credible. Additionally, the previously enumerated wealth of verified details supplied by the informant may properly be considered in assessing his veracity and credibility.[35] These details, coupled with the fact that he arranged illicit purchase negotiations, provide conclusive corroboration of his reliability. In sum, we conclude that the requirements of *Aguilar, Spinelli* and *Whiteley* have been met. There was ample probable cause to arrest.

III

Defendants next assert that the evidence must be suppressed because, even though the warrantless arrest was not unlawful, the searches which resulted in the seizure of 200 pounds of cocaine were. We cannot agree. When agent Hudson opened the door to enter, the drug was in plain view on the living room floor. Without question, it was subject to seizure at that time.[36]

Defendants nevertheless assert that the evidence must be suppressed because Agent Robinson's view through the window, which apparently took place just

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[35]Id.

[36]Chimel v. California, 395 U.S. 752 (1969); Harris v. United States, 390 U.S. 234, 236 (1968); United States v. Williams, ——— F.2d ——— (5th Cir. 1971) [No. 30743, June 17, 1971].

seconds prior to their arrest, was an unjustified warrantless search. We agree that Agent Robinson's conduct must be regarded as a search,[37] but are nevertheless of the opinion that it suffers no constitutional infirmity because it was necessarily executed pursuant to a valid arrest that was in no way dependent upon Agent Robinson's observations to bootstrap its validity. In this case the events leading up to the arrest occurred in such close sequence that it is immaterial that the arrest occurred later in time than Agent Robinson's view into the house.[38] Under *Chimel v. California*,[39] an arresting officer may constitutionally search a suspect and the area "within his immediate control"[40] in order to avoid danger to himself and to prevent the destruction of evidence. In this case, the agents had been cautioned that defendants might be armed and dangerous. Moreover, the agents knew that their surveillance had been detected. In these circumstances it is certainly reasonable for the agents to survey the apartment in an attempt to learn in advance whether the arrest would be dangerously and forcefully resisted. It would have been imprudent indeed for them to enter the apartment without exercising at least this degree of care for their own safety. We will not,

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[37]McDonald v. United States, 335 U.S. 451 (1948); State v. Gonzales, 388 F.2d 145 (5th Cir. 1968); Brock v. United States, 223 F.2d 681 (5th Cir. 1955). It is beyond dispute that Agent Robinson violated the curtailage of the apartment.

[38]Brookins v. United States, 434 F.2d 41 (5th Cir. 1970); cert. denied 39 U.S. L.W. 3360 (and cases there cited); Kinser v. Cooper, 413 F.2d 730 (6th Cir. 1969); Hart v. Simpson, 340 F.2d 853 (7th Cir. 1965).

[39]395 U.S. 752 (1969).

[40]Id. at 763.

nor does *Chimel*, require them to do so since the search was incident to a lawful arrest.

IV

Finally, defendants attempt to establish that the cocaine was unlawfully seized, since its seizure was preceded by a technical "breaking" of the door by agents who had not properly announced their purpose in demanding admission. According to *Miller v. United States*,[41] to justify the breaking it must appear either that the agents did in fact announce their purpose or that facts known to them before the breaking would "justify them in being virtually certain that [the occupants] already [knew] their purpose so that an announcement would have been a useless gesture."[42]

In the circumstances of this case, we do not hesitate to hold that *Miller's* requirements have been met; the officers were fully justified in being "virtually certain" that the occupants of the apartment were aware of an impending arrest. The officers knew that the suspects had detected their surveillance only a short time beforehand, and they knew that a violation of the narcotics laws was being perpetrated inside. Agent Hudson knocked on the door, announced "Police" in English and Spanish and directed the occupants to "open the door." Agent Robinson announced through

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[41]357 U.S. 301 (1958).
[42]Id. at 310.

the window "you are under arrest."[43] Although no attempt was made to open the door, both agents heard hurried movement inside. The sound of breaking glass was heard just as Agent Hudson opened the door. We conclude that it would be grossly unrealistic to say that, at this point, the occupants of the apartment did not suspect discovery and fear arrest when "police" came to their door.[44] A more elaborate announcement of purpose by the agents in this case would indeed have been a "useless gesture"; and the agents were justified in being "virtually certain" of this fact.[45]

In conclusion, we hold that the defendants' motion to suppress should have been denied. The judgment of the district court is reversed and the case is remanded to the district court for proceedings not inconsistent with this opinion.[46]

REVERSED and REMANDED.

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[43]Although we doubt that his statement is itself determinative of whether § 3109 was complied with, see notes 2 and 3 supra, it is an important consideration in determining whether *Miller's* standard of "virtual certainty" has been complied with.

[44]Additional evidence plainly shows that the occupants of the apartment were in fact aware of the officers' purpose. The record clearly shows that all three of them attempted to avoid arrest by hiding or escaping.

[45]Miller v. United States, 357 U.S. 301 (1958).

[46]Because of our conclusion that no unreasonable search occurred we need not consider whether all defendants had standing to raise the 4th amendment issue.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1143

D. C. Docket No. 70-572-CR-CF

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

OSCAR SQUELLA-AVENDANO, MARCO OSORIO, Etc., ANDRES R. RODRIGUEZ, CARLOS ROJAS, RODOLFO QUINTANILLA, RAUL DeMARIA and JORGE VASQUEZ,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before BROWN, Chief Judge, and GEWIN and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for proceedings not inconsistent with the opinion of this Court.

August 25, 1971

Issued As Mandate: